* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

September 25, 2000
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: XXXXXXX

Date of Filing: August 28, 2000

Case Number: VFA-0602

On August 28, 2000, XXXXXXX filed an Appeal from a final determination that the Ohio Field Office (Ohio) of the Department of Energy (DOE) issued on July 14, 2000. 1/ XXXXXXX submitted two requests for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. In its determination, Ohio informed XXXXXXX that it could not locate any documents pursuant to a search mandated by the Privacy Act. Ohio also informed XXXXXXX, however, that it located three documents pursuant to a search under the FOIA. Ohio determined that two of these three documents were not agency records and thus were not subject to release under the FOIA. Ohio released to XXXXXXX the other document after withholding portions under the FOIA. XXXXXXX challenges the search conducted for responsive documents and Ohio's withholding of information. This Appeal, if granted, would require Ohio to conduct another search for responsive documents and release the information it withheld.

Background

XXXXXXX filed two requests with DOE Headquarters in Washington, D.C., under the FOIA and the Privacy Act, in which she requested documents regarding the following categories of information:

> 1. Information regarding a May 2, 2000 meeting between XXXXXXX and Randy Tormey (Ohio Office of Chief Counsel), Nat Brown, Sandra Cramer (Office of Diversity) and Bob Folker (Deputy Manager) including all reports, letters, notes, meeting minutes, and management decisions pertaining to XXXXXXX generated by the above named offices;

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1/ XXXXXXX's initial submission to us did not contain a copy of the determination letter she sought to appeal as required by 10 C.F.R. § 1004.8(a). She subsequently supplied us with the determination letter on August 28, 2000.

2. A copy of the investigation report issued by the Ohio Field Office Work Place Threat Assessment Team concerning XXXXXXXXXXX supervisory harassment complaint; and

3. All reports, letters, notes, meeting, minutes, and management decisions regarding a meeting between Bob Folker, Randy Tormey, and Sandra Cramer regarding a statement authored by XXXXXXX's physician.

On June 15, 2000, these requests were forwarded to Ohio for processing.

In its July 14, 2000 determination letter responding to both of XXXXXXX's requests, Ohio stated that it searched its systems of records subject to the Privacy Act and could find no documents that were responsive to her request. Pursuant to the FOIA, Ohio identified three documents possibly responsive to her requests. Two of these documents, a page of notes authored by Sandra Cramer regarding a May 16, 2000 meeting (Cramer Notes) and a two-page handwritten document written by Randy Tormey (Tormey Notes) concerning a May 2, 2000 meeting, were not provided to XXXXXXX since Ohio determined that the documents were not agency records under the FOIA and thus were not subject to release. The remaining document was a one-page document (Report) printed out from the Ohio Field Offices' Workplace Violence Threat Assessment Team Database (WPV Database). Ohio provided XXXXXXX with a redacted version of this document. Ohio stated that the withheld material consisted of unsworn statements, personal opinions and witness speculations that it asserted were subject to the deliberative process privilege and were thus withheld pursuant to Exemption 5 of the FOIA. Ohio also withheld names and other identifying information of individuals mentioned in the Report pursuant to Exemption 6. Ohio found that the privacy interest of the interest of the individuals mentioned in the Report outweighed the public interest in releases of the names.

XXXXXXX maintains that Ohio has failed to provide her all of the responsive documents in its possession. In support of her claim,XXXXXXX names several individuals who may have interviewed people in connection with her complaint.XXXXXXX also states that the Workplace Violence Threat Assessment Team (Team) completed an investigation in May 2000 relating to an Equal Employment Opportunity complaint she had filed and that the Team had a meeting on May 3, 2000.

## Analysis

### A. Adequacy of the Search

#### 1. Search under the Privacy Act

The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her contained in any system of records the agency maintains. 5 U.S.C. § 552a(d). The DOE regulations define a system of records as "a group of any records under DOE control from which some information can be retrieved by using the name of the individual or

by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

We contacted Ohio to inquire as to the search for records it conducted pursuant to the Privacy Act. Ohio informed us that it did not specifically search for records in any of its systems of records because none of them was likely to contain the very detailed type of records described in XXXXXXX's request. We subsequently reviewed a list of the system of records maintained at Ohio. We agree that none of the systems of records maintained at Ohio was likely to contain the requested records. Consequently, we find that Ohio's decision not to search any of its system of records under the Privacy Act was reasonable.

2. Search under the FOIA

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. NSA, 610 F.2d 824, 834 (D.C. Cir. 1979).

We spoke to several officials at Ohio to determine the extent of the search that was made for responsive documents. Upon receiving the two requests from XXXXXXX, the FOIA Officer, Marian Schomaker, immediately contacted each of the individuals referenced in the requests. Each of the individuals then conducted a search to locate responsive documents. See Memorandum of telephone conversation between Marian Schomaker, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Mr. Tormey and Ms. Cramer each located notes that were identified in Ohio's determination letter. Memorandum of telephone conversation between Randy Tormey, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000); Memorandum of telephone conversation between Sandra Cramer, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Ms. Schomaker then contacted Tim Marcus of the Ohio Workplace Violence Threat Assessment Team and asked him to search for responsive documents. Mr. Marcus searched the WPV Database and located one document which was subsequently provided to XXXXXXX in part. Mr. Marcus informed us that any notes taken by investigators on the Team are destroyed after he personally places the information into the MPV database. See Memorandum of telephone conversation between Tim Marcus, Workplace Violence Threat Assessment Team, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Ms.

Schomaker also had a search conducted for responsive documents in the office of the Deputy Manager. 2/

Given the above description of the search conducted for responsive documents, we find that Ohio conducted an adequate search for responsive documents. Ohio contacted each of the individuals XXXXXXX referenced in her requests and asked each to locate any responsive documents. 3/ Ohio then searched the Team records in order to locate any records regarding its investigation concerning XXXXXXX's complaint. While XXXXXXX references a May 2000 investigation by the Team in her appeal, we have been informed that the Team did not in fact conduct an investigation. See Memorandum of telephone conversation between Marian Schomaker, Ohio Field Office, and Richard Cronin, Assistant Director, OHA, (September 5, 2000); E-mail from Tim Marcus to Marian Schomaker (July 15, 2000) 4/ In sum, Ohio conducted a search reasonably calculated to locate documents responsive to XXXXXXX's requests.

B. Agency Records

We have considered Ohio's determination that the Tormey and Cramer Notes were not agency records and find it to be correct. Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and it was used for an agency purpose. Kissinger v. Committee for Freedom of the Press, 445 U.S. 136, 157 (1980); Bureau of Nat'l Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (BNA); J. Eileen Price, 25 DOE ¶ 80,114 (1995) (Price).

In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. See BNA 742 F.2d at 1492-93; Price. We contacted Ms. Cramer, who informed us that she created her notes regarding the May 16, 2000 meeting for her personal use so that she would remember details regarding the meeting. Her notes were not kept in any DOE record system but were kept in a personal file that she uses for her notes. She also informed us that her practice is to dispose of such notes after an

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2/ Mr. Folker, Deputy Manager at the time of the meetings, had left his position by the time of XXXXXXX's FOIA requests.

3/ In her appeal, XXXXXXX identified another individual who might have responsive documents. In light of the fact that this new information not available to Ohio when it processed her request, XXXXXXX should consult with Ohio to see if additional documents can be located.

4/ Ohio did not provide XXXXXXX a copy of Marcus' July 15, 2000 E-mail since it did not believe that it was responsive to her original request. Ohio has informed us that it will be sending XXXXXXX a copy of the E-mail in its entirety.

appropriate period of time. Memorandum of telephone conversation between Sandra Cramer, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Mr. Tormey stated that he customarily takes notes at meetings he attends for his personal use. He never incorporated his notes of the May 2, 2000 meeting in any DOE record. Memorandum of telephone conversation between Randy Tormey, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). From the facts surrounding the creation and use of the Cramer and Tormey Notes, it is apparent that they do not possess any of the attributes of an agency record. They were never maintained in an agency file nor used for any official agency purpose. See Price. Consequently, we find that Ohio correctly determined that the Cramer and Tormey Notes were not agency records under the FOIA.

C. Exemption 5

Ohio withheld portions of the fifth paragraph in the Event Summary Section of the Report pursuant to Exemption 5. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. In order for Exemption 5 to shield a document, the document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. EPA v. Mink, 410 U.S. 73, 87-91 (1973). An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

We have reviewed the withheld text and find that it was not properly withheld pursuant to Exemption 5. All of the material withheld pursuant to Exemption 5, except for a portion of one sentence, discussed below, appears to be factual and does not seem to be deliberative. Consequently, we will remand this matter to Ohio. On remand, Ohio should either release this material or issue another determination letter explaining why this material should be withheld. The material withheld from the sentence beginning "[H]is determination at the time . . . ." refers to the impressions and

opinion of an individual concerning a workplace incident. This material appears to be deliberative and predecisional and thus properly withheld pursuant to Exemption 5.

D. Exemption 6

Ohio deleted names and other identifying information from the Report pursuant to Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. See generally Ripskis, 746 F.2d at 3.

1. Privacy Interest

We find that the individuals whose names were withheld have a strong privacy interest in remaining anonymous. The Report references individual names concerning an investigation of an accusation that Ohio management appeared to tolerate an atmosphere that could result in workplace violence. Given the sensitive nature of the investigation and the potential for harassment, intimidation, or other personal intrusions, we find that significant privacy interests exists in the identities of individuals mentioned in the Report. See Cappabianca v. Commissioner, United States Customs Service, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnessess and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Accordingly, we find that the individuals whose identities were withheld have a significant privacy interest in maintaining their confidentiality. 5/

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5/ It should be noted that scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted. Armstrong v. Executive Office of the President, 97 F.3d 575, 581 (D.C. Cir. 1996) (Armstrong). For example, civilian federal employees normally have no expectation of privacy concerning their names, titles and similar information. See 5 C.F.R. § 293.311. However, the name of a federal employee involved in a workplace situation of a sensitive nature might be withheld pursuant to Exemption 6. See Armstrong, 97 F.3d at 582 (dicta indicating that FBI might be entitled in certain factual contexts to use a categorical rule protecting the names of FBI agents pursuant to Exemption 6).

2. Public Interest in Disclosure

In Reporters Committee, the Supreme Court found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's basic purpose. Reporters Committee, 489 U.S. at 772. The Court identified the basic purpose of the FOIA as "to open agency action to the light of public scrutiny." Id. (quoting Department of Air Force v. Rose, 425 U.S. 352, 372 (1976)). Therefore, the Court held that official information that sheds light on an agency's performance of its statutory duties falls squarely within the FOIA's statutory purpose. Id. at 773. The Court further found that information about private citizens that is contained in government files but reveals little or nothing about an agency's own conduct does not further the basic purpose of the FOIA. Id. After examining the Report, it is not apparent that release of the individuals' names and identifying information would contribute to the public's understanding of the DOE's behavior or performance in carrying out its duties. Thus, in the present case, we conclude there is little or no public interest in the disclosure of the names and identifying information withheld in the documents at issue in the present case.

3. The Balancing Test

Because release of the individuals' names or other identifying information could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against little or no public interest, we find that release of information revealing the individuals' identities could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. Consequently, we find that the Ohio properly withheld the information redacted from the Report under Exemption 6.

E. Conclusion

In sum, we find that Ohio conducted an adequate search for documents pursuant to the FOIA and Privacy Act and properly withheld information in the Report pursuant to Exemption 6 of the FOIA. We also find that Ohio correctly determined that the Cramer and Tormey Notes were not agency records and not subject to release pursuant to the FOIA. However, we find that Ohio improperly withheld factual material in the Report pursuant to Exemption 5. Consequently, XXXXXXX's Appeal will be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by XXXXXXX, on August 28, 2000, Case No. VFA-0602, is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Ohio Field Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. §552 (a)(4)(B) and 5 U.S.C. § 552a(g)(1). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 25, 2000